SUPREME COURT, U. S.
Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1227

CARLO MASTROTATARO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSEPH J. BALLIRO
44 School Street
Boston, Massachusetts
Attorney for the Petitioner

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No.

CARLO MASTROTATARO,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on February 25, 1972.

Opinion Below

The opinion of the Court of Appeals for the Fourth Circuit is not yet reported, but is annexed hereto as an Appendix commencing at page 17.

Judgments Below

The Judgment of the United States District Court for the District of Maryland was entered on June 17, 1971, and is annexed hereto as an Appendix at page 22.

The Judgment of the United States Court of Appeals was entered on February 25, 1972.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

Questions Presented

1. A defendant is deprived of due process of law if the Government is permitted to prevent a defendant's access to a prospective witness for the purpose of interview in preparation for trial.

2. The danger inherent in permitting the United States Attorney to introduce evidence of unrelated crimes and argue fanciful characterizations is fundamentally antagonistic to the concept of due process.

Statutes Involved

18 USCA

Section 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

18 USCA

Section 2314. Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . shall be fined not more than $10,000 or imprisoned not more than ten years or both.

Statement of the Case

This is a petition seeking review of judgments of the Court of Appeals for the Fourth Circuit affirming judgments of conviction of the District Court for the District of Maryland.

On September 29, 1970 an indictment was returned against your petitioner, charging him, in its fourth count, with aiding and abetting in the interstate transportation of stolen securities.

Trial commenced on April 12, 1971 and concluded on April 15, 1971 with a verdict of guilty.

A judgment of conviction was entered by the District Court on June 17, 1971 and was affirmed by the Court of Appeals for the Fourth Circuit on February 25, 1972.

Statement of Facts

Prior to the commencement of trial the petitioner, by way of written motion, complained that he was being denied access to a witness, one Vincent Teresa,[1] as the result of

[1] It was assumed, at the time of the motion, that Teresa's testimony would represent the major part of the Government's case against the petitioner. The trial record unequivocally illustrates that without the testimony of Teresa a judgment of acquittal would have to have been allowed.

his having been secreted by the Government, and moved that arrangements be made for him to "Interview Vincent Teresa". The motion was denied by the trial court (R.A. 28,30)[2]

In oral argument on the motion the Government reiterated its position set forth in its written reply to the effect that:

> "Mr. Teresa is incarcerated and serving a Federal sentence. He was advised that the defendant and/or his counsel wished to interview him. Mr. Teresa advised the authorities that he did not wish to be interviewed by the defendant and/or his counsel. Accordingly, no purpose could be served by making available to the defendant and/or his counsel the name of the institution in which Mr. Teresa is presently serving his sentence." (R.A. 29, 30)

In support of the Government's allegation that the petitioner aided and abetted in the transportation of stolen securities, Teresa testified that he received a telephone call from one Jack Mace of New York, who had three $100,000 stolen Treasury bonds and who agreed to take $25,000 in advance for the securities and the balance of moneys when the securities were sold. Teresa called the petitioner, told him that he wanted to borrow $25,000 to give to Mace, and explained why he needed the money. He told him that he would only need the $25,000 for a week or ten days, and that the petitioner could share in the deal (Tr. 185); he arranged an appointment to meet the petitioner the next day in the petitioner's car in front of the building which housed the Esquire Sportsmen's office, where he received the $25,000 from the petitioner, after explaining to the petitioner that the money was to pay for $300,000 worth

[2] The letters "R.A." refer to the Record Appendix filed in the Court below.

of Treasury bonds, which were being obtained from Jack Mace and Artie Tortorella in New York, and were to be transferred to Joe Schwartz and Harrison in Baltimore. Mondavano then went to New York, gave the money to Mace in exchange for the bonds and then delivered the bonds to Schwartz in Baltimore (Tr. 185, 186). A few days after the bonds had been sent to Baltimore, the petitioner told Teresa that in lieu of sharing in the proceeds from the deal he would take a $10,000 fee for the loan of the $25,000 (Tr. 188). Teresa testified that several days after the bonds were sent to Baltimore he was notified that when Schwartz tried to negotiate the bonds it was discovered that they were stolen and the deal had fallen through. He testified that the petitioner allowed him to pay 1% per week interest on the $25,000, which he owed to the petitioner.

Teresa also was permitted to testify that he was involved with the petitioner in other unrelated criminal activities involving the petitioner in participating in the proceeds of swindling people in card games (Tr. 142)[3] and loaning money at usurious rates of interest (Tr. 151, 154, 155).

The Government was permitted to introduce testimony from a second witness, Jack Hirschfeld, the sole effect of which was to corroborate the witness Teresa's testimony of the petitioner's involvement in offenses unrelated to the indictment against the petitioner. This testimony concerned itself principally with allegations that the petitioner received 25% of the proceeds from illegal gambling (R.A. 304); that the petitioner was a "key factor" in a junket business conducted by Teresa (R.A. 306); and that the petitioner was paid moneys due him out of the proceeds of unrelated illegal stock transactions by partners of the witness Teresa (R.A. 315, 321, 322).

With the foregoing evidence as a setting for argument, the Government attorney was permitted, over objection, to

[3] The letters "Tr." refer to the transcript of the trial.

characterize the petitioner as a boss of organized crime and to argue "In summary, Ladies and Gentlemen, I submit to you that the evidence in this case lays bare the inner workings of big-time organized crime." (Tr. 450, R.A. 363)

Reasons for Granting the Writ

The reasons proposed by petitioner for granting the writ will be stated under each of the headings relating to the respective questions presented.

I. A Defendant Is Deprived of Due Process of Law if the Government Is Permitted To Prevent a Defendant's Access to a Prospective Witness for the Purpose of Interview in Preparation for Trial.

"A criminal trial, like its civil counterpart, is a quest for the truth. That quest will more often be successful if both sides have an *equal* opportunity to interview the persons who have the information from which the truth may be determined . . ." *Gregory* v. *United States*, 369 F.2d 185, 188 (1966, D.C. CA) (emphasis added)

In *United States* v. *Vole*, 435 F.2d 774, 778 (1970, 7 Cir.), even though it was ". . . unclear what opportunities defense counsel had to interrogate the government's witnesses" and the government asserted, ". . . they had ample opportunity," the court stated its ". . . wish to make it clear that witnesses are the special property of neither party and in the absence of compelling reasons, the district court should facilitate access to them before trial whenever it is requested." Citing *Gregory* v. *United States*, supra.

The right of free and unhindered access to every witness was articulated by the 9th Circuit in *Byrnes* v. *United States*, 327 F.2d 825 (1964). Although in *Byrnes* the defendant's position was disapproved, the court pointed out

that there was "no prohibitory order of the court . . ." and that "In fact, the record discloses the trial court endeavored in every reasonable way to assure all witnesses they could talk to the defendant privately and freely, *if they so desired*." At page 833.

In the instant case the court accepted the representation of government counsel that Teresa "did not wish to be interviewed by the petitioner and/or his counsel". We do not put in issue the credibility of that representation. We do submit that it falls far short of inquiry sufficient to establish that the witness understands that the petitioner has the right of access to him, that he has the right to consent and that his refusal to be interviewed is free from taint of improper suggestion by some agent of the government.

"It should be clear . . . that counsel for a defendant is entitled to interview prospective witnesses held in the custody of the Commonwealth. That right is not satisfied in this case by an indirect communication to counsel that the witness did not wish to see them. In practice, in such situations counsel for the defense should within an appropriate time file a motion to be allowed to interview the witness. The witness should thereafter be brought to court and instructed on his or her rights to consent or not to consent to the interview. A record should be kept of the proceedings. The answer of the witness will then determine whether an interview is to take place . . ." *Commonwealth* v. *Carita*, 240 N.E. 2d 5, 11 (1969).

That Mr. Teresa was known to be a vital witness should require no discussion. Neither should there be speculation as to whether he would ultimately have agreed to have been interviewed by defense counsel had the court exercised its proper supervisory role in providing the defense with access to the witness. In the interest of preparing his defense, with every effective opportunity of preparing his defense,

the court was obligated to make certain that the witness was properly instructed as to his rights and those of the petitioner. That obligation was not satisfied by an indirect communication routed through one of the adversaries to the proceedings.

II. The Danger Inherent in Permitting the United States Attorney To Introduce Evidence of Unrelated Crimes and Argue Fanciful Characterizations Is Fundamentally Antagonistic to the Concept of Due Process.

To characterize the petitioner as a boss of organized crime as well as having committed a miscellany of crimes unconnected with and unrelated to the instant charge is obviously grievous prejudice. What remains, then, is to see if it is the kind of prejudice that the law permits.

The law is well settled and totally opposed to improper attempts that seek to establish guilt by impugning a defendant's character. *Michelson* v. *United States*, 335 U.S. 469, 69 S. Ct. 213 (1948); *Lovely* v. *United States*, 169 F.2d 386 (4 C.A., 1948); *Lane* v. *Warden*, 320 F.2d 179 (4 C.A., 1963). Testimony on a defendant's character is not rejected because it is "... irrelevant, on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." The overriding policy of excluding such evidence "... is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice." *Michelson* v. *United States*, supra at p. 476, citing 1 Wigmore, Evidence (3rd Ed., 1940) s. 57.

The exclusionary rule is not absolute, however, and for limited purposes, it is subject to several exceptions.

1. Characterizations by prior bad acts may be admissible for the limited purpose of proving knowledge, intent, mo-

tive, scheme. *Michelson* v. *United States*, supra; *Lovely* v. *United States*, supra. "... (B)ut it is well settled that such evidence is not admissible where it has no relevance or probative value except insofar as it may show a tendency or likelihood on the part of the accused to commit the crime." *Lovely* v. *United States*, supra, citing *Sutherland* v. *United States*, 92 F.2d 305, 308 (4 Cir., 1937); *Simkins* v. *United States*, 78 F.2d 594 (4 C.A. 1935); *Breeding* v. *United States*, 73 F.2d 778 (4 C.A. 1934); *Boyd* v. *United States*, 142 U.S. 450, 12 S. Ct. 292, 295, 35 L. Ed. 1077. On this basis, evidence of prior bad acts may be introduced to prove intent and knowledge but only if it has probative value beyond merely showing that the defendant's evil character makes it mighly likely that he committed the crime charged. What is required is a showing of a high degree of similarity between the past acts and the present charges. *Lovely* v. *United States*, supra.

In *Benton* v. *United States*, 233 F.2d 491, 492 (4 C.A. 1956), this Court found that there was not the requisite amount of similarity in a case involving unlawful possession of ingredients for distilling. The evidence in question dealt with prior liquor violations and the defendant's "reputation of being part of a syndicate engaged in the operation of a large distillery". The Court referred to its decision in another liquor case and quoted: "Proof of finding whiskey on defendant's premises ten months before the offense for which he was being tried had no reasonable tendency to prove that offense; but it did have a tendency, coupled with the conflicting statements attributed to him to prejudice him greatly in the eyes of the jury." *Benton* v. *United States*, supra, p. 43, quoting *Sutherland* v. *United States*, 92 F.2d 305, 308 (4 C.A. 1937). In these cases a similar offense was not enough to prove intent in the current crime when the earlier offense occurred ten months earlier.

In the instant case the record clearly shows that the petitioner was not involved in the earlier bond transactions and was informed in a vague and general way that Teresa and his group had committed those crimes only *after the fact*. The record is also clear that the petitioner did not share in the many thousands of dollars that Teresa and his associates received as their share of the prior transactions.

Again, although the inference may have been warranted that the loan sharking and illegal gambling were taking place at or about the time the instant offense was alleged to have been committed, they hardly can be considered as offenses "similar" to the one charged.

In short, if the petitioner was being accused of being a boss of big-time organized crime that concerned itself with the sale of stolen securities, the accusation was unfounded; if the petitioner was being accused of being a boss of big-time organized crime concerned with the gambling business, the accusation was irrelevant. In either case, the evidence fell far short of the exception provided for in *United States* v. *Chase*, 372 F.2d 453, 461 (1967), to the effect that evidence of subsequent *similar* acts were allowable when they ". . .were closely connected in time to the conspiracy which existed. . . they were identical in nature to those charged in the conspiracy indictment."

". . . the fact that intent is in issue is not enough to let in evidence of similar acts, unless they are 'so connected with the offense charged in point of time and circumstances as to throw light upon the intent'." *Boyer* v. *United States*, 132 F.2d 12, 13.

No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. Its tendency to create hostility, surprise and confusion of issues is thought to outweigh its probative value. *Boyer* v. *United States*, supra.

Courts have avoided the requirement of similarity in instances where another act was so inter-twined or otherwise connected with the crime charged that it almost merged with the offense. When the defendant's other act is a step in the commission of the crime charged, it is admitted because its probative value is that it is part of the crime rather than characterization of the defendant. In *Rakes* v. *United States*, 169 F.2d 739 (4 C.A. 1948) the defendant was convicted of willful misapplication of funds and he appealed because of admission of evidence of forgeries. The forgeries, however, were checks which he deposited into his own account and then quickly withdrew. The crimes were so interrelated that evidence of one tended to prove the other. In *United States* v. *Dutsch*, 357 F.2d 331 (4 C.A. 1966), the defendant was convicted of interstate communication of threats made to his mother. He threatened that he would get her and would not miss this time, referring to an attempt on her life five years before. The early attempt characterized the words and gave them meaning and the judge's limiting instructions and final charge to the jury prevented undue prejudice.

In *United States* v. *Hutchinson*, 352 F.2d 404, (4 C.A. 1965), the defendant was convicted of interstate transportation of stolen securities. The case involved a defrauded woman who was approached by the defendant posing as an insurance man. He offered her a check, larger than the amount of her losses due to the fraud, and asked her for a check covering the over payment. She paid him the difference, and he left leaving her with the worthless insurance payment. The original fraud was committed by unnamed parties and was admitted by the trial judge to place the crime in the proper perspective. This Court affirmed that decision stating "without this background the acts under consideration here would not have been comprehensive. By his false representations to the prosecutrix the

defendant himself made irrelevant the challenged evidence." *Hutchinson,* supra, p. 405.

These cases outline exceptions to the general rule that attacks on a defendant's character must be excluded. In *Rakes,* supra, the court held that the earlier bad act was a step in the commission of the crime charged and necessary to the government's case. In *Dutsch,* the court reasoned that though the prior act was damaging to the defendant, he had referred to it in his threat and evidence of the earlier crime was necessary for the government's case. In *Hutchinson,* the court held that the earlier crime, even though not committed by the defendant, was necessary as background material to explain how the crime charged was perpetrated.

The instant case cannot qualify for the exception because loan shark and gambling operations and involvement in organized crime are not steps in the specific crime charged. There is no evidence that the petitioner's prior acts were necessary steps in the willful causing of interstate transportation of stolen securities. Since the government has not presented evidence of such a relationship, there can be no necessity in admitting the prejudicial evidence under the exception.

Further, the government cannot argue that the evidence was admitted under the *Dutsch* or *Hutchinson* exceptions because, first, there is no link by way of reference to the past crimes. Nothing in the evidence presented shows any factual connection between the offenses charged in the indictment and prior bad acts of the defendant. Therefore, there can be no justification for admission of this prejudicial evidence on grounds that it is a necessary part of the crime. Second, there is no necessity for background matter since witness Teresa's testimony was clear and complete in regard to the offense charged. He as a leading participant in the crime along with other witnesses was able to re-

late to the jury the entire circumstances immediately surrounding the crime and the steps in its perpetration. His testimony was clear and concise and required no modification or explanation. Whether believable or not, the story was comprehensible. Third, the evidence presented offered no relevant background information. The testimony regarding the legal and illegal aspects of gambling junkets, regarding turning suckers into loan sharks, regarding plans for a Caribbean casino, regarding a chain of command in organized gambling has no relevance to the crime charged and may be interesting to the jurors as an aside but can only prejudice the petitioner's case before them. The government can fill the vacuum to provide a more comprehensive atmosphere but in this case there was so much prejudicial "background information" inserted that it is like the proverbial tail wagging the dog.

It should be clear that in seeking to persuade the jury to believe Teresa's testimony that the petitioner furnished him with $25,000, the prosecution was permitted to cast the petitioner in a robe that did not fit the case at hand, but was tailored instead to graphically exploit evidence of international junketeering (R.A. 76), illegal gambling (R.A. 69), loansharking (R.A. 80, 81) and a hierarchy of organized crime (R.A. 66, 67) — evidence that a jury could hardly fail to relate to current, almost daily headlines, but evidence having little to do with the issue of whether the petitioner gave Teresa $25,000.

Examples of improper argument are as varied as the imagination of counsel will permit. The standards to be observed by counsel and court, however, are clear and often cited; the common denominator always being in accord with impartiality and fairness to the end that issues before the fact finder not be improperly beclouded.

". . .The judge is the only disinterested lawyer connected with the proceeding. He has no interest except to see that

justice is done and he had no more important duty than to see that the facts are properly developed and that their bearing upon the question at issues are clearly understood by the jury." *Simon* v. *United States*, 4 Cir., 1941, 123 F.2d 80 at p. 83.

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. . ."

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none . . ." *Berger* v. *United States*, (1935) 295 U.S. 78, 88 (Also see *Wallace* v. *United States*, 285 F.2d 656, 674, 676, 677, 4 Cir., 1960 and *United States* v. *Guglielmini*, 384 F.2d 602, 606, 2d Cir. 1967.)

The position of your petitioner is much like that expressed by the Fifth Circuit in *Turner* v. *United States*, 415 F.2d 1234, 1236 (1969): "There is no dispute that the United States Attorney's statements were based on testimony in the trial. The rub is that the information provided by the United States Attorney's statements is wholly unrelated to the charge and thus had no tangible connection to the prosecutions case. . ."

There is an additional "rub" in the instant case. If the

United States Attorney's characterization of the petitioner was meant to describe his role in junkets, illegal gambling and the inferences to be drawn from "bossism" then, like *Turner,* it was unrelated to the instant case. If, however, the characterization was meant to be expressive of the petitioner's role in the charge against him, then unlike *Turner,* it lacks even the justification of being based on the evidence in the case.

The failure of the trial court to allow a defense motion to strike the characterization encouraged the government to repeat it (R.A. 364) and eventually led to the petitioner's having to content himself with the court's bland instruction that ". . .counsel's statements are merely argument . . ." (R.A. 365). Although "mere(ly) argument" the characterization of the petitioner is the classic example of an underworld boss who insulates himself from prosecution must be considered to have devastating impact on jurors who traditionally rely on the court and United States Attorney to guide them to the proper issues for their deliberation, an impact hardly removed by the court later sandwiching in the middle of its charge to the jury the single sentence that ". . .the defendant is not on trial for any act or conduct not alleged in the indictment" (Tr. 496).

The Court below did indicate its displeasure ". . . of the extremely lavish treatment accorded by the prosecution to some of these matters . . ." and in "admonish(ing)" District Attorneys in the future "to observe restraint in the production of evidence of this character" characterized the matter as a "borderline case". (See Opinion, Appendix, p. 20)

We suggest that the number of cases coming before this Court in which complaints are made of the prosecution, through over zealousness or otherwise, grossly overstepping its bounds are not cured by the kind of mild admonition recorded in the Opinion of the United States Court

of Appeals for the Fourth Circuit, and certiorari should be granted because this case gives the Court a timely opportunity to set a standard that will be respected in both Federal and State jurisdictions.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted

JOSEPH J. BALLIRO
44 School Street
Boston, Massachusetts
Attorney for the Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1706.

UNITED STATES OF AMERICA,
APPELLEE,
versus
CARLO MASTROTOTARO,
APPELLANT.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

(Argued November 30, 1971
Decided February 25, 1972.)

Before SOBELOFF, Senior Circuit Judge, and CRAVEN and FIELD, Circuit Judges.

Joseph J. Balliro for Appellant, and J. Frederick Motz, Assistant United States Attorney, (George Beall, United States Attorney, on brief) for Appellee.

SOBELOFF, Senior Circuit Judge:

This is an appeal from a jury conviction for aiding and abetting in the transportation of three stolen United States Treasury bills from New York City to Baltimore, Maryland. Appellant was charged with violating 18 U.S.C. §§ 2, 2314 by supplying $25,000 to Vincent C. Teresa in the knowledge that Teresa would use the money as a down-payment for the three stolen bills, each in the face amount

of $100,000, and with the further knowledge that the stolen bills were to be transported in interstate commerce. Appellant was indicted and tried with three others who were convicted, but the jury failed to agree as to him and he was retried alone. After the second jury returned its guilty verdict, appellant was fined $5,000 and sentenced to nine years imprisonment.

Mastrototaro's chief grievance concerns the trial court's rulings allowing testimony by two of his past associates which revealed certain prior crimes and allegedly prejudiced him by reflecting adversely on his character. The evidence complained of came from Vincent Teresa and John M. Hirschfeld, government witnesses who had, at Mastrototaro's first trial, been convicted of complicity in the theft and transportation of the Treasury bills involved in the instant case.

Not objected to at trial or assigned as error on appeal, although denied by the appellant, was Teresa's testimony that appellant did deliver to him the $25,000 and that appellant knew, at that time, the use to which the money was to be put. This testimony was the only direct proof of the passing of the money and of appellant's guilty knowledge.

The appellant contends that it was improper to permit Teresa and Hirschfeld to portray in heavy detail various criminal activities in which they participated with Mastrotaro on other occasions. Appellant further contends that the testimony at issue was not sufficiently connected with the $25,000 to outweigh the prejudicial force with which it colored appellant's character in the mind of the jury.

The bulk of the challenged testimony described the business relationships existing among appellant, Teresa and Hirschfeld, including the arrangement of gambling junkets to London and Haiti and the operation of a gambling casino in the Caribbean. The witnesses' recollection of

these subjects was heavily interlaced with accounts of the use of crooked dice, the employment of so-called "mechanics" to manipulate card games and of loansharking whereby appellant, Teresa and Hirschfeld preyed on certain selected customers. The thrust of this evidence was that appellant controlled a loosely-knit gambling and loansharking organization, of which Teresa and Hirschfeld were participants, and that appellant supervised and maintained a measure of control over their activities.

The Government maintains that the testimony here attacked was properly admitted to illuminate the background of the $25,000 loan, to demonstrate the nature of the relationship between the parties, and to explain to the jury why Teresa decided to go to Mastrototaro rather than anyone else for the money.

In evaluating these conflicting claims, we are mindful that wide discretion is invested in the District Judge to balance the possible prejudice to a defendant from the revelation of unrelated crimes against the probative force of the evidence to support the charge in the indictment. *United States* v. *Samuel*, 431 F.2d 610, 612 (4th Cir. 1970); *United States* v. *Gardin*, 382 F.2d 601 (2d Cir. 1967).

Evidence of the commission of one crime is not admissible merely to prove the defendant a "bad man" and therefore more likely to have committed the crime charged. *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *Benton* v. *United States*, 233 F.2d 491 (4th Cir. 1956). Nevertheless, if, in the process of proving an element of the crime, such as intent, knowledge or absence of mistake, the testimony discloses other crimes involving the defendant, it is no objection to the admission of such testimony. *See, e.g., United States* v. *Brickley*, 426 F.2d 680 (8th Cir.), *cert. denied*, 400 U.S. 828 (1970); *United States* v. *Chase*, 372 F.2d 453 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); *United States* v. *Dutsch*, 357 F.2d 331 (4th Cir. 1965).

Although this is a borderline case, we are unable to say that admission of the testimony amounted to an abuse of the trial court's discretion. There was a sufficient link between the testimony complained of and an element of the crime charged, namely, knowledge of the purpose for which the $25,000 was supplied, to support the admission of the challenged evidence. If the Government had limited itself to bare proof of delivery of the money without indicating the context, one might readily question the story's believability. The transaction Teresa narrated was certainly not a normal one and a juror could well doubt that, out of the blue, Mastrototaro would supply Teresa $25,000 in one hundred dollar bills, as Teresa claimed and Mastrototaro denied.[1] What the disputed testimony clarifies is the motivation of the appellant in delivering the money to Teresa. When the course of prior dealings between the parties is fully explored, Teresa's story becomes not only plausible, but convincing. Moreover, since it was the Government's burden to establish not only that the money was delivered, but that Mastrototaro knew the illegal purpose to which the money was to be applied, it was in order for the Government to trace the parties' course of conduct.

While we conclude that proper limits have not been overstepped in this case, we do not approve of the extremely lavish treatment accorded by the prosecution to some of these matters. A prudent prosecutor limits himself to what is needed to prove that charge in the indictment. In the process of proving the charge, other offenses may sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of "background" material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction. We therefore admonish District Attorneys to ob-

[1] Teresa testified that the arrangement was for the payment of $60,000 in all for the $300,000 worth of stolen bills.

serve restraint in the production of evidence of this character.

Our present criticism aside, however, we are persuaded there was a sufficiently strong thread connecting the challenged evidence to an element of the crime charged so that the trial court, in the exercise of its discretion, could find, as it did, that the probative value of the evidence outweighed any prejudice appellant could have suffered.

Appellant, in addition, raises other claims of error. Although not vigorously pressed, we have, nonetheless, carefully considered each of them and find them without substance.

Accordingly, the judgment is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND

No. 70-0363 Criminal — Indictment
for Vio. Title 18 USC,
Secs. 2314 and 2.

UNITED STATES OF AMERICA
v.
CARLO MASTROTOTARO

On this 17th day of June, 1971 came the attorney for the government and the defendant appeared in person and "by counsel".

IT IS ADJUDGED that the defendant has been convicted upon a Jury Verdict of "Guilty" of the offense of (Count 4) Interstate Transportation of Stolen Securities; Aiding and Abetting,

as charged

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Nine (9) Years, and to pay a fine of Five Thousand ($5,000.00) Dollars, with costs.

U. S. COSTS: $477.66

DEFENDANT'S COSTS: $20.00

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) ILLEGIBLE
Chief Judge,
United States District Court

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FILED
MAY 17 1972
MICHAEL RODAK, JR., CLERK

No. 71-1227

In the Supreme Court of the United States

OCTOBER TERM, 1971

CARLO MASTROTATARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1227

CARLO MASTROTATARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of having aided and abetted the interstate transportation of stolen United States Treasury bills, knowing them to have been stolen, in violation of 18 U.S.C. 2314. Petitioner was sentenced to nine years' imprisonment. The court of appeals affirmed (Pet. App. A).

Petitioner's principal contention that the trial court abused its discretion in admitting evidence as to other crimes is fully dealt with and properly rejected in the opinion of the court below upon which we rely. Petitioner's remaining contention that he was improperly denied an opportunity to interview a government witness prior to trial is without merit.[1] The particular

[1] The court below deemed this point to be without substance and did not discuss it (Pet. App. A 21).

witness was then serving time in a federal prison and was advised that petitioner or his attorney desired to interview him. But, as the Assistant United States Attorney told the court: "Mr. Teresa [the witness] advised the authorities that he did not wish to be interviewed by the defendant and/or his counsel" (Pet. 4).[2] This is not a case in which the prosecutor deliberately hindered petitioner's access to a witness but simply one in which the witness did not desire to be interviewed by petitioner or his attorney. See *United States* v. *Long*, 449 F. 2d 288, 295–296 (C.A. 8), certiorari denied, March 6, 1972 (Nos. 71–702, 71–5916, 71–5924 and 71–5925); *United States* v. *Dryden*, 423 F. 2d 1175, 1177–1178 (C.A. 5), certiorari denied, 398 U.S. 950.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[2] Petitioner does not dispute the credibility of the representation but asserts that the witness should have been brought before the court for determination of whether his refusal to be interviewed was "free from taint of improper suggestion by some agent of the government" (Pet. 7). The record, however, does not indicate that petitioner asked that such a procedure be followed (Tr. 23, September 23, 1970) or that he asked for a hearing at trial to determine whether the witness was improperly influenced. In any event, any error in failing to follow this procedure was harmless in light of the fact that petitioner's first trial, at which the same witness also testified, ended in a mis-trial after the jury failed to agree on a verdict. By the time the witness testified at the second trial petitioner was fully aware of the testimony to be given by the witness and had access to all Jenks Act material.

U.S. GOVERNMENT PRINTING OFFICE 1972

JUN 20

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-122

CARLO MASTROTOTARO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR REHEARING

JOSEPH J. BALLIRO
44 School Street
Boston, Massachusetts
Attorney for Petitioner

Of Counsel:
HENRY D. KATZ

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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No.

CARLO MASTROTOTARO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari entered on June 7, 1972, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

I. THE CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL.

In the abstract the principle that

> "Witnesses to a crime are not the property of the prosecution or the defense and both sides have an equal right and should have an equal opportunity to interview them."[1]

[1] *Callahan* v. *United States*, 371 F. 2d 658, 660 (9th Cir. 1967); *Gregory* v. *United States*, 125 U.S. App. D.C. 140, 369 F. 2d 185, 188 (1966); *United States* v. *Long*, 449 F. 2d 288 (8th Cir. 1971).

is not questioned by the Petitioner in his Petition for a Writ of Certiorari or the Respondent in its memorandum in opposition. However, the issue presented, stated in its narrowest form, is whether the Court must affirmatively act to insure the availability of all witnesses to both sides in a criminal proceeding. The memorandum of the United States avoids the issue and cites cases which further exemplify the conflict and confusion existing on this principle.

In *United States* v. *Long*, 449 F. 2d 288 (8th Cir. 1971), the Court concluded that

> "... it would have been a better procedure if the trial court had permitted the attorneys for the defense to hear directly from the witness Neal whether he would be willing to talk to the defense attorneys, either alone or in the presence of his attorney."
>
> *Long*, supra at p. 296.

In *United States* v. *Dryden*, 423 F. 2d 1175 (5th Cir. 1970), the witness requested a government officer to prevent the defendant from interviewing him and apparently followed the prosecutor's advice in refusing to talk to the defendant. The trial court ruled and the Court of Appeals affirmed that there was nothing unconstitutional in the government's interference with the defense's opportunity to interview.

In *Gregory* v. *United States*, 369 F. 2d 185 (D.C.Cir. 1966), the Court concluded that equal access and opportunity to interview meant without interference or suggestion and questioned the necessity of the prosecution's suggestion to its witnesses that they not submit to an interview unless the prosecutor were present. *Gregory* is in

direct conflict with *Dryden, supra*, and the ruling in the instant case.

The Petitioner requested to interview the witness Vincent Teresa, who was held in custody by the government, and the court denied this request based merely on the government's assertion that Mr. Teresa did not want to be interviewed. *United States* v. *Long*, 449 F. 2d at p. 296 suggests that the better procedure in the instant case would have been to hear directly from Mr. Teresa whether he wished to be interviewed. *Gregory* and its insistence on equal access to witnesses would necessarily concur. *Dryden*, however, would not.

The United States in its memorandum in response to Petitioner's brief suggests that the Petitioner may have waived his right to such procedure[2] by not requesting it more energetically and further suggests that since the instant proceeding was the second trial (the first ending in mistrial), the Petitioner had more than adequate discovery of the witness's testimony. Both of these arguments miss the issue of whether the court must insure the equal access and opportunity to all witnesses.

For these reasons, therefore, the denial of certiorari should be reconsidered.

II. The Violation Of Principles Of *Michaelson* v. *United States*, 335 U.S. 469, 69 S.Ct. 213 (1948).

The issue presented by Petitioner arises out of a determination by the trial court that testimony regarding Peti-

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[2] See fn. 2, p. 2 Memorandum for the United States in Opposition, *Carlo Mastrototaro, Petitioner* v. *United States of America*, No. 71-1227.

tioner's prior bad acts and associations was admissible. The Court of Appeals held that the trial court's ruling was not an abuse of discretion because even though the challenged testimony amounted to nearly 80% of that presented by the government, there was a sufficient line between it and the crime charged. The Court of Appeals stated: "(W)e do not approve of the *extremely* lavish treatment accorded by the prosecution to some of these matters." (Emphasis added) *United States* v. *Mastrototaro*, 455 F. 2d 802, 804 (4th Cir. 1972).

Thus, the issue becomes defined as how much prejudicial evidence may be admitted before a defendant's right to a fair trial is lost. We submit that this issue requires an analysis which goes beyond that made by the Court of Appeals and the District Court in the instant case. It is not enough to merely establish that each piece of evidence may be admitted under certain exceptions to the general rule of exclusion without viewing the evidence in the aggregate.

Although the admission of one or two of the prejudicial statements may have inflicted only some harm to the Petitioner, once it became apparent that most of the government's case consisted of prior bad acts and associations, the government's argument that background material was needed could not outweigh the accumulated prejudice to the Petitioner. The thrust of the question presented is not whether the trial court was correct in admitting each piece of evidence but whether, as the Court of Appeals described it, ". . .the extremely lavish treatment accorded by the prosecution to some of these matters." *Mastrototaro, supra*, required a reversal.

The Court of Appeals stated:

> "In the process of proving the charge, other offenses may sometimes come to light incidentally, but when the prosecution devotes excessive trial time to this type of 'background' material, it runs the risk of trespassing into the impermissible area and jeopardizing any resulting conviction."
>
> *Mastrototaro, supra,* at p. 804.

We agree with this statement presented by the Court of Appeals but submit that that court only paid lip service to it since the Court's opinion concludes by upholding the admission of each piece of evidence based on a link between the evidence and the crime charged.

We submit that the proper analysis for the admission of concededly prejudicial evidence is to view it from two perspectives:

(1) from its effect at the initial point of its offering; and
(2) from its effect on the trial as a whole.

Therefore, at some point during the course of the trial the District Court erred in not sustaining the Petitioner's objections and allowing his motions to strike testimony relating to prior bad acts and associations.

The Petitioner was convicted by evidence attacking his character which had been admitted by the trial court contrary to the spirit of *Michaelson* v. *United States*, 335 U.S. 469, 69 S. Ct. 213 (1948) and this fact calls for a re-evaluation of the denial of certiorari and to permit Petitioner's conviction to be appraised without the prejudicial attacks on his character and associations.

Conclusion

For the reasons set forth above as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

JOSEPH J. BALLIRO
Counsel for the Petitioner

CERTIFICATE OF SERVICE

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

Counsel for Petitioner